

Testimony is support of HB 494, Amending Title 76 to reduce adverse impacts of Subdivision for Lease or Rent.

Senate Local Govt. Comm.
Exhibit No. 6

Date 3-9-2011

Bill No. HB 494

Sterling Miller. Co-owner, Dunrovin Guest Ranch, PO Box 822, Lolo, MT 59847 (406-273-7745, 541 6730 (day), millers@nwf.org, Dunrovin@bigsky.net).

- The subdivision for lease or rent (SLR) language currently in Title 76 is a looming disaster for thousands of private property owners and small businesses in Montana. Thousands of Montana jobs are at stake especially in Montana's tourist and building industries. The current law also seriously threatens and erodes private property rights and property value. Failure of the legislature to act will seriously impede Montana's economy and appropriate landowner rights and prerogatives.
- The Attorney General has a draft decision (dated March 2010) that, if released in its current form, will expand the scope of SLR to all 56 counties in Montana and not just the 3 where it is currently being applied by overzealous county officials. These officials are using the current law as a surrogate for zoning thereby circumventing local voters' reluctance to pass zoning regulations. I'm informed that the AG has delayed issuing his draft opinion in the hope that this legislature will address this abuse by County officials.
- The draft AG's opinion finds that subdivision review is required when there is any alteration of a parcel of land that will allow a portion of it to be leased or rented, whether existing or proposed. Although currently being applied by the 3 counties primarily when the alternation involves a second structure on a property that includes a "residence", the AG's draft opinion makes clear that nothing in the current law restricts its application to residences or even structures.
- SLR review is required under the existing law even though nothing on the parcel or any portion of the parcel is actually being sold. The draft AG's opinion makes it clear that the mere existence on a parcel of a structure or piece of land that is or could be used for lease or rent exposes the landowners to the review requirement.
- Subdivision "review" may sound innocuous but in many counties involves extremely costly or impossible-to-achieve elements. For example, in our case the required subdivision review would require that we obtain very wide access easements on a private road that has many adjacent landowners; such easements would be impossible for us to obtain and are unnecessary to achieve any legitimate local government concern or interest.
- Local county officials currently hold hostage to completion of SLR review, permits for things that are legitimate public interests such as sewage system upgrades or building permits for structures that are not residences.
- The current law requiring SLR review applies to a second structure regardless of how long it has been there. There is a case in Condon where County officials mandated SLR review in a case where the second structure on a parcel was 100 years old and falling apart even though the entire parcel was in conservation easement and could never be subdivided. In our case the structure now being considered an "unauthorized subdivision" requiring subdivision review was legally built 25 years ago, long before we bought our property.
- On the other side is a draft amendment prepared in the House but not considered. This amendment is acceptable to us.
- The draft AG's opinion and many other documents are available at the website: www.MontanaSubdivisionLaw.com.

Amendments to House Bill No. 494
2nd Reading Copy

Requested by Representative Michele Reinhart

For the House Committee of the Whole

Prepared by Helen Thigpen
February 19, 2011 (11:39am)

1. Title, page 1, line 6.

Following: "AMENDING"

Strike: "SECTION"

Insert: "SECTIONS 76-3-202 AND"

2. Page 1, line 10.

Insert: "Section 1. Section 76-3-202, MCA, is amended to read:

"76-3-202. Exemption for structures on complying subdivided lands conveyances of one or more buildings, structures, or improvements. Where required by this chapter, when the land upon which an improvement is situated has been subdivided in compliance with this chapter, the sale, rent, lease, or other conveyance of one or more parts of a building buildings, structure structures, or other improvement improvements, whether existing or proposed, situated on one or more parcels a single parcel of land or on multiple parcels of land in the same ownership is not a division of land as provided in 76-3-103 and is not subject to the terms provisions of this chapter-:

(1) if the parcel or parcels and the buildings, structures, or other improvements are in conformance with applicable zoning regulations; or

(2) if local zoning regulations are not in effect:

(a) the parcel or parcels resulted from a subdivision under parts 5 and 6 and the subdivision application, preliminary plat, or other information reviewed by the governing body incorporated multiple buildings, structures, or other improvements on individual lots; or

(b) the buildings, structures, or other improvements are:

(i) a single dwelling structure and accessory structures of not more than four additional dwellings;

(ii) multiple structures intended for rental or storage units; or

(iii) related to a single agricultural operation."

{Internal References to 76-3-202:

x76-6-203 x76-7-203 }"

Renumber: subsequent sections

- END -

HB 494. Testimony of Bill and Joyce Derick in favor.

Our address is 3936 E. Shore Drive, Helena, Mt. 59602. Our email is mt.mini@yahoo.com, and our phone is: 406 475 9898 or 406 422 8200 (cell). We regret we are out-of-town for medical reasons. We have asked our colleague Sterling Miller to present this testimony on our behalf.

- ✓ We are the litigants in the case *Derick v Lewis and Clark County* filed in 2007 after 4 years of trying unsuccessfully to resolve the issue without litigations. This case resulted because Lewis and Clark County mandated that we undergo subdivision review because we have a 1,300 ft² apartment on our property above a detached garage as well as our house. Our goal was to supplement our retirement income by renting to a single person or couple. Instead we've spent tens of thousands trying to resolve. My wife and I are the only occupants of our house. The county has acknowledged that we fully conform to septic requirements and other utilities are acceptable for both units.
- ✓ The fact that our litigation is ongoing currently is the only reason that the Attorney General has not yet issued his March 2010 draft opinion requested by Missoula County on whether the county is correctly interpreting the subdivision for lease or rent (SLR) language in Title 76. The draft opinion says it is being correctly interpreted. If that opinion is finalized, it will become established law in all 56 counties in Montana. This means this legislature must correct and clarify the language leading to this interpretation. HB 494 does this but it is necessary to be sure that it is absolutely clear that the exemption described in part 1 of 76-3-204 (as proposed in HB 494), apply to unzoned portions of Montana. The currently language can be misinterpreted because of the "only" in part 2 of the proposed change. This leaves it open to a interpretation that part 1 applies "...ONLY...WHEN... local zoning regulations are in effect". This possible mis-interpretation does not reflect the intent of the legislation proposed by Rep. Edmunds.
- ✓ Subdivision review is an impossible burden in our situation as it also is for many other landowners. These stipulations are completely ridiculous for a 1 acre parcel that will most probably house a maximum of 4 people (but approved for two - 2 bedroom homes). To illustrate this point, I attach a list of the stipulations mandated by the County for successful completion of subdivision review of our property.
- ✓ Please note especially, point 5 relating to the requirement that we obtain a 60' public access and utility easement on Federal roads over which we have absolutely no control. Also note requirement 8 that we install a 30,000 gallon water storage tank for fire protection even though we live right on the Canyon Ferry Reservoir which has millions of gallons of water. Also, please note the requirements that we hire a professional engineer to verify various things that can be easily seen with the naked eye.
- ✓ Finally, as part of our litigation we obtained the attached affidavit from Mr. Rich Weddle who was the author of the 1973 version of Title 76 and virtually all amendments subsequently and was an assistant Attorney General in Montana for 29 years. Mr. Weddel affirms that the County's interpretation of requiring subdivision in my case is incorrect (see points 13-15 on page 3).
- ✓ Thank you for helping fix this horrible abuse of authority by County officials.

Lewis & Clark County requirements for Rental Subdivision Application

(Bill Derick- October 5, 2010, Greg THESE NOTES ARE FOR DISCUSSION PURPOSES ONLY)

(Note: Underlined & Bold comments added by Bill Derick for HB 494 bill testimony)

1. Additional home for rent lease or other conveyance.
2. Lot 163 of the Canyon Ferry Cabin sites, located at 3936 East Shore Drive
3. Water and sewer have been approved, will need a note from Frank Preskar for substantial and credible evidence. Received confirmation from Frank he is ok.
4. Covenants prohibit second dwelling and would need to be changed, OR a letter from the BOR stating that both homes fall under Article II. C., Historic Uses **(Adequate documentation exists that we fully conform with covenants)**.
5. Roads, access to his lot must be a 60' public access: **(Impossible! - Federal Roads)**
 - a. East Shore Drive is located on BOR ground, is NOT a public access easement, although the access is a 60' easement. East Shore would have to be dedicated as a 60' Public access and utility easement.
 - b. Access onto Moonlight Lane would need to be verified with a 60' dedicated public access easement from East Shore Drive onto Moonlight Lane.
 - c. Easement from East Lake Shore to lot 163 is currently established as a 40' wide access and utility easement. This would need to be a 60' public access and utility easement.
 - d. Dedicated easement for an emergency vehicle turn around meeting county specification at the lot location.
 - e. Verification from a Professional Engineer as to construction of all roads from lot 163 to Canyon Ferry Road. Engineer certification would also need to include a discussion of all slopes on the roads to meet county specifications.
 - f. Grading and Drainage plan prepared by a professional engineer for all road work.
 - g. Traffic impact analysis prepared by a qualified engineer for all segment of the access roads from lot 163 to Canyon Ferry Road.
 - h. Would probably be required to waive the right to protest the formation of an RID and may be required to contribute to the RID for the roads within Canyon Ferry Crossing if using those roads for access.
 - i. Lot 163 is located more than 750 feet on a dead end road and a variance would be required from the length of the dead-end road.
6. Water body setbacks currently require a 100 foot setback from the typical high water mark for all construction and a 50 re-vegetated buffer zone. **(We built in full conformance with all applicable 1999 & 2000 regulations)**.

7. Proof of a permit for the boat launch would be required. (All required permits in hand.)
8. Fire Protection would be required of 250 gpm at 20psi, or 30,000 gallon storage tank with dry hydrant. May request to utilize the fire protection at Canyon Ferry Crossing. Will require a letter allowing them to utilize the services and a letter from Lakeside Fire Service Area that the fire protection facilities are in working order. (We are 50 ft. from Canyon Ferry Reservoir.)
9. Additional subdivision requirements, mailboxes, weed management plan, etc. (Huge in itself.)

please
see

weddel affidavit
following -

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

BILL DERICK and JOYCE DERICK, Plaintiff(s), vs. LEWIS AND CLARK COUNTY, Defendant(s).	Cause No.: BDV-2007-403 AFFIDAVIT OF RICHARD WEDDLE
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STATE OF MONTANA)
 : ss
LEWIS AND CLARK COUNTY)

Richard M. Weddle, Esq., being first duly sworn upon oath, deposes and says:

1. I am a graduate of DePauw University, Greencastle, IN (BA, 1963) and Indiana University School of Law, Bloomington, IN (JD, 1966).
2. For a period of 29 years, I served as a Special Assistant Attorney General and Staff Attorney for the Montana Department of Commerce and its predecessor agencies specializing in the law of land-use planning, zoning, and subdivision regulation.
3. I was the principal draftsman of the Montana Subdivision and Platting Act (SB 208) adopted in 1973, and I was involved to one degree or another in the drafting of virtually all subsequent amendments to the Subdivision and Platting Act up until 2000.
4. I am the author of the Montana Zoning Law Digest (1989, 1996, 2000) and the

Affidavit of Richard Weddle

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Montana Subdivision Law Digest (1992, 1994, 1995, 2000).

5. During my 29 year-tenure with the State of Montana, I was the State of Montana's designated expert on local government and land use law and responsible for providing direct legal assistance and guidance regarding these areas of law to county attorneys, city attorneys, county and city planners and other local government officials to insure uniformity of administration of subdivision and land use laws across the state.

6. I was responsible for conferring with the staff of the Montana Attorney General in the drafting of Attorney General opinions pertaining to local government and land-use law, particularly including the Subdivision and Platting Act, and I was responsible for reviewing and commenting on draft Attorney General opinions in these statutory and practice areas.

7. I was responsible for coordinating the administration of local government law among the various local government entities in the state to ensure consistency in application, identifying and resolving inconsistencies among local governments and providing consistent advice and direction to city and county attorneys. This included researching legislative intent and developing formal legal opinions to provide guidance in consistent application of land-use laws throughout the state. I provided legal opinions for local government administrative proceedings and helped resolve conflicts between local governments, attorneys, and the public.

8. I gave scores of presentations on the Subdivision and Platting Act (and on the Administrative and Model Rules implementing the Act) and on related land-use laws at seminars sponsored by numerous local governments and a wide range of organizations including the State Bar of Montana, the University of Montana School of Law, the Montana County Attorneys Association, the Montana Association of Clerks and Recorders, the Montana City Attorneys Association, the Montana Association of Counties, the Montana League of Cities and Towns, the Montana League of Women Voters, the Public Land Law Review, the Montana Planners Association, the Montana Land Title Association, the Montana Association of Registered Land Surveyors, the American Society of Farm Managers and Rural Appraisers, the Montana Environmental Quality Council, the Montana Consensus Council, and Montana State University.

10. I provided legal assistance and advice to legislators and representatives of the Governor's Office on the formulation and analysis of proposed local government and land-use legislation including drafting bills and amendments, reviewing drafts prepared by others, coordinating research with the Legislative Services Division, and identifying and articulating the impacts of legislative alternatives.

11. I understand that Bill and Joyce Derick own a single lot upon which are located two dwelling units, a main house and a separate garage building with an apartment above the garage. I understand that the Dericks propose to rent the apartment above the garage, but not the garage on the lower level.

12. I understand further that Lewis and Clark County officials have taken the position that the rental of the garage apartment by the Dericks would be a "subdivision" subject to subdivision review and regulation by the County under the Montana Subdivision and Platting Act.

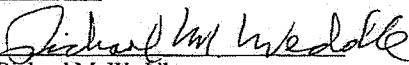
13. If I had been asked to comment on this situation during my tenure with the Department of Commerce, I would have taken the position that the Derick's proposal is not a "subdivision" as that term is defined in section 76-3-103(15), MCA, because it: (a) does not involve a division land, (b) will not constitute a resubdivision or a condominium, and (c) will not create an area that will provide multiple spaces for recreational camping vehicles or mobile homes. This would be my opinion regardless of whether the Dericks intended to rent the entire garage/apartment structure rather than just the apartment unit.

14. With exceptions not pertinent to the Dericks' proposal, the application of Montana's Subdivision and Platting Act is triggered by a "division of land" as that term is defined by section 76-3-103(4), MCA. The activity proposed by the Dericks is not a division of land under that subsection. Furthermore, it is expressly exempted from subdivision review by section 76-3-204, MCA. This provision, initially adopted in 1973, was amended by the Montana Legislature in 1985 to "clarify that the conveyance of one or more parts of a building is not a subdivision."

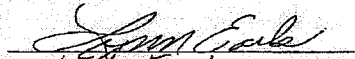
15. I understand that Lewis and Clark County is basing its position regarding the Dericks' proposal in part on a decision rendered by Montana's Twenty-First Judicial Court, Jefferson County, in *John Rose and Sandy Rose, d/b/a/ Skalkaho Lodge and Steak House v. Ravalli County*, Cause Number DV 05-016, decided May 1, 2006. Based on my knowledge of the Montana Subdivision and Platting Act it is my opinion that the *Rose* decision misconstrues section 76-3-208, MCA, in a way that would effectively nullify section 76-3-204, MCA, and frustrate the obvious legislative intent underlying that provision. Furthermore, the facts involved in the Dericks' situation appear to be readily distinguishable from those presented in the *Rose* case. The Dericks propose to rent a single apartment with insignificant land-use implications. The Roses, on the other hand, had proposed to construct and rent four separate guest cabins located on a tract already occupied by a commercial guest lodge. In reaching its conclusion the *Roses* court may have been heavily influenced by the sheer magnitude of this proposal.

Further your Affiant sayeth not.

Dated this 17th day of December, 2008.


Richard M. Weddle

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public for the
State of Montana, this 17th day of December, 2008.



Lynn Earls

(Printed Name)

Notary Public for the State of Montana

Residing at: Helena, MT

My Commission expires: 10/12/2009

(SEAL)

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"From the Back of a Horse the World Looks Wider" ~ Joyce Gibson Roach

Date: February 17, 2011

To: Montana State Legislature, House Local Government Committee

Subject: HB 494: A BILL FOR AN ACT ENTITLED: "AN ACT REVISING PROVISIONS GOVERNING EXEMPTION FROM SUBDIVISION REVIEW FOR THE SALE, RENT, LEASE, OR OTHER CONVEYANCES OF BUILDINGS, STRUCTURES, OR OTHER IMPROVEMENTS; AND AMENDING SECTION 76-3-204, MCA."

Testimony: by SuzAnne M. Miller, Co-owner of Dunrovin Ranch

As the owner of a small guest ranch located on the Bitterroot River about 10 miles south of Missoula, I strongly urge the Montana State Legislature to pass HB 494 for the following reasons:

1. **Common Sense** – Requiring subdivision review for any alteration of a parcel of land that would allow a portion of it to be leased or rented defies common sense on several levels.
 - Merely building a structure such as a fence, a barn, or a second residence implies neither the intent to rent or lease nor to subdivide the parcel of property.
 - Renting or leasing a portion of a single piece of property does not constitute a transfer of property and hence should not be considered a "subdivision." This is completely inconsistent with other Montana laws and plain common sense. If renting constitutes a transfer of property, how would any landlord ever be able to evict a tenant for nonpayment of rent?
 - Currently the law considers the number structures on a single piece of property rather than the number of people utilizing the property. A single structure housing a 100 people does not invoke the subdivision for lease or rent provision, while two separate structures housing 2 people does. Under the laws its "roofs not residents" that count. This makes no sense in terms of road use, traffic, or other issues of public concern.
2. **Multiple Structures Critical to Guest Ranch Industry** – Guest cabins are the quintessential guest ranch accommodations and are greatly preferred by guest ranch clients. It is nearly impossible to create a guest ranch that relies on a single structure for accommodations, meeting rooms, dining room, etc. Furthermore, guest ranches should not have to face country subdivision review every time they need to add or change structures.
3. **Important to Tourism Industry** – The tourism industry is critical to Montana's economy. Tourism brings not only direct expenditures and supports thousands of permanent and seasonal jobs, but it serves as Montana's front porch for attracting businesses which have nothing whatsoever to do with tourism. Business people from across the country come to Montana as a tourist and end up moving their businesses and companies here to take advantage of our unsurpassed quality of life. The subdivision for lease or rent provisions of Title 76 in its current form represent a very big threat to Montana's tourism industry.
4. **Small Business are the Backbone of Montana's Economy** - More than most states, Montana relies on small businesses for the majority of its jobs and economic activity. Title 76 is particularly detrimental to small businesses that operate on thin profit margins. Imposing costly, and at time impossible, subdivision requirements on small business can make the difference closing and reaming financially viable. Small businesses such as storage units, dog kennels, and horse barns are all subject to meaningless subdivision review under the current law.